

11 U.S.C. §544(a)(1)-(a)(3)
O.R.S. 79.1010
O.R.S. 79.1020(3)
O.R.S. 79.1040(10)
Land Sale Contract
Perfection
Security Interest
Strong Arm Powers

Bullock v. Roost,
In re Gold Key Properties, Inc.,

BAP No. OR-93-1635-AsMeO
Adv. Proc. 689-6179-R7
Case No. 689-60578-R7

2/4/94

BAP affirming A.E.R.

unpublished

Debtor was the owner of the vendor's interest in a land sale contract and the real property subject thereto. Debtor executed a promissory note in favor of the plaintiffs and as security assigned them an interest in the land sale contract. The assignment was recorded but no U.C.C. financing statement was filed regarding the assignment of the debtor's interest in the land sale contract.

After an involuntary chapter 7 proceeding was instituted against the debtor the plaintiffs commenced this adversary proceeding seeking a declaration that they held a valid and properly perfected security interest in the debtor's interest in the land sale contract and the real property. The trustee contended that he could avoid the plaintiffs security interest by use of his strong arm powers under either 11 U.S.C. §544(a)(1) or (a)(3).

The bankruptcy court held that although the plaintiffs had a valid, perfected security interest in the vendor's interest in the real property, they lacked a valid perfected security interest in the debt which the property secured. Under Oregon law the assignment of a security interest without the assignment of the debt yields the assignee nothing and hence the plaintiffs' security interest in the real property was a nullity. The court found that the plaintiffs' interest in the land sale contract was subordinate to the trustee's.

The Bankruptcy Appellate Panel affirmed the bankruptcy court's holding that recording an assignment is insufficient to perfect an interest in the proceeds of a land sale contract. Further, the BAP affirmed the bankruptcy court's holding that a trustee's actual or constructive knowledge of recordation of an interest has no effect on his powers as a judicial lien creditor. Finally, the BAP upheld the bankruptcy court's holding that plaintiffs' security interest without the assignment of the underlying debt was null, and therefore subordinate to the trustee's interest.

NOT FOR PUBLICATION

FILED

FEB - 4 1994 *u.d.*

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

9 In re) BAP No. OR-93-1635-AsMeO
10 GOLD KEY PROPERTIES, INC.,)
11 Debtor.) Adv. No. 689-6179-R
12 _____)
13 MILO BULLOCK and)
14 BLANCHE BULLOCK,)
15 Appellants,)
16 v.) MEMORANDUM
17 ERIC R. T. ROOST, Trustee,)
18 Appellee.)

19 Argued and Submitted on
20 January 20, 1994 at Portland, Oregon

21 Filed - FEB - 4 1994

22 Appeal from the United States Bankruptcy Court
23 for the District of Oregon

24 Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

25 _____
26 Before: ASHLAND, MEYERS, and OLLASON, Bankruptcy Judges.

1 make installment payments under the contract directly to the
2 Bullocks. Paragraph 17 of the Cade land sale contract provides in
3 part that in the event of breach or default, seller may accelerate
4 the debt, foreclose the contract, or pursue any other right or
5 remedy at law. Appellant's E.R. 102, ¶ 17.

6 The property in question consists of a parcel of real property
7 and a mobile home thereon. According to the Douglas County Tax
8 Assessor's Office, the property and mobile home have an assessed
9 value of \$14,607. Cade has failed to make installment payments
10 under the contract since November of 1991 and had failed to pay
11 certain taxes on the property.

12 No payments on the January 1984 promissory note had been made
13 to the Bullocks by Gold Key. Likewise, Cade had not made any
14 payments to Gold Key to reduce the principal balance on the land
15 sale contract. On December 17, 1989, a total of \$31,333.38 was
16 owed under that contract.

17 Paragraph 3 of the assignment agreement provides as follows:

18 In the event that Assignor shall fail to perform its
19 obligations under [the note] within thirty days
20 after written notice of default is given, Assignee
21 shall be entitled to foreclose this Assignment by
22 suit in equity for strict foreclosure. The parties
23 agree that foreclosure of this Assignment shall be
24 governed by the rules governing strict foreclosure
25 of land sale contracts rather than by the rules
26 contained in ORS Chapter 86 governing mortgages and
that the only equity of redemption of Assignor shall
be that fixed by the court in its final decree of
strict foreclosure.

25 Appellant's E.R. 96, ¶ 3.

26 On February 27, 1989 an involuntary Chapter 7 petition was

1 filed against Gold Key; the order for relief was entered on July
2 14, 1989. On October 6, 1989 the Bullocks filed a motion for
3 relief from the automatic stay based upon Gold Key's default under
4 its promissory note. The court denied the motion. The Bullocks
5 then filed an adversary complaint for declaratory relief for
6 determination of the validity of their lien and the status of their
7 claim to the debtor's interest in the Cade land sale contract. The
8 parties filed cross motions for summary judgment.

9 On October 5, 1990, the bankruptcy court entered its order
10 granting, in part, and denying, in part, each party's motion for
11 summary judgment. An opinion was issued in connection with the
12 order which relied on the Oregon Supreme Court case, Security Bank
13 v. Chiapuzio, 304 Or. 438, 747 P.2d 335 (1987). The bankruptcy
14 court held that the trustee could not use his strong arm powers
15 under Bankruptcy Code § 544 to avoid the Bullocks' asserted
16 security interest in the real property which was the subject of the
17 Cade contract. However, the bankruptcy court further held that
18 pursuant to § 544(a)(1) and (2), the trustee could avoid the
19 Bullocks' interest in the land sale contract and their right to
20 receive the contract payments.

21 The court's order was appealed to this panel. The appeal was,
22 however, dismissed on July 30, 1991 because the court's order
23 granting partial summary judgment to each of the parties was
24 interlocutory.

25 On September 15, 1992 trial ensued on the remaining issues of
26 the adversary proceeding. On March 19, 1993, the bankruptcy court

1 filed a memorandum opinion in the case holding that because the
2 Bullocks did not properly perfect their interest in the Cade
3 contract or the stream of payments provided for therein, their
4 interest in the property is a nullity. Based on this conclusion,
5 the court further denied the Bullocks' requests that the trustee be
6 required to abandon the Cade contract, for relief from stay, and
7 for reconsideration of the court's October 5, 1990 order. Judgment
8 was entered on April 26, 1993 and the Bullocks filed a timely
9 notice of appeal of the judgment on May 6, 1993.

10
11 STATEMENT OF THE ISSUES ON APPEAL

12 Whether the bankruptcy court erred in holding that the
13 Bullocks' security interest in the proceeds of the Cade land sale
14 contract was not properly perfected under Oregon law because the
15 Bullocks did not file a UCC financing statement.

16 Whether the court erred in finding that the recordation of the
17 assignment in Douglas County did not provide constructive notice to
18 the trustee sufficient to save the Bullocks' otherwise unperfected
19 security interest in the contract proceeds.

20 Whether the court erred in holding that because the Bullocks'
21 interest was not properly perfected, their interest in the property
22 subject to the contract is a nullity and avoidable by the trustee
23 and denying the Bullocks' motions to compel abandonment and for
24 relief from the automatic stay based on this holding.

25 / / /

26 / / /

1 similar fact scenario as in the present case. In that case, the
2 plaintiff bank acquired the vendor's interest in a land sale
3 contract and the property subject to the contract as collateral for
4 a loan. The bank recorded its interest in the real property
5 records but did not file a financing statement with the secretary
6 of state. Thereafter, the vendor sold its interest in the contract
7 and the land to Chiapuzio. When the bank sued to foreclose on its
8 security interest in the land sale contract and the land subject
9 thereto, Chiapuzio contested the foreclosure claiming that his
10 interest was superior to that of the bank's because the bank failed
11 to properly perfect its interest in the proceeds of the land sale
12 contract.

13 The Chiapuzio court acknowledged that two separate and
14 distinct interests were assigned; the land sale contract and
15 interest in the real property subject to the contract. The court
16 then attempted to reconcile two seemingly conflicting sections of
17 the Oregon UCC; ORS 79.1040(10) stating that Article 9 does not
18 apply to the creation or transfer of an interest in or lien on real
19 property; and ORS 79.1020(3) stating that the application of
20 Article 9 "to a security interest in a secured obligation is not
21 affected by the fact that the obligation is itself secured by a
22 transaction or interest to which [Article 9] does not apply."
23 Chiapuzio, 304 Or. at 442, 747 P.2d at 337, quoting, ORS
24 § 79.1020(3). To perfect a security interest in the land,
25 recording in the real property records is appropriate; but to
26 perfect a security interest in the contract a UCC financing

1 statement must be filed. The court concluded that the application
2 of Article 9 to the bank's security interest was not affected by
3 the fact that the obligation was itself secured by a real property
4 interest, to which Article 9 does not apply. "Because the Bank
5 failed to perfect its Article 9 security interest, the Bank's
6 security interest would be subordinate to any buyer who gave value
7 and received delivery of the collateral without knowledge of the
8 security interest." Chiapuzio, 304 Or. at 452, 747 P.2d at 343.

9 Additionally, an Oregon bankruptcy case, In re Cox, 68 B.R.
10 788 (Bankr. D. Or. 1987) supports this position. In Cox, the
11 vendees in a land sale contract gave a mortgage and deed of trust
12 in the property subject to the contract to secure payment of loans.
13 The documents were recorded in the real property records. The
14 vendees subsequently assigned their interest in the land sale
15 contract to the debtor Cox. The court allowed the trustee in
16 bankruptcy to avoid the interest of the holders of the mortgage and
17 the deed of trust because their interests were not properly
18 perfected by the recordation.

19 The bankruptcy court, applying this precedent to the facts in
20 this case, correctly concluded that Bullocks' recording of the
21 assignment from Gold Key was insufficient to perfect its interest
22 in the proceeds of the land sale contract. The Bullocks, however,
23 assert that the Oregon real property recording statutes and Article
24 9 of the UCC were both amended in October 1989 to allow an assignee
25 of a land sale contract for security purposes to record his
26 interest in the contract itself in the real property records. The

1 trustee did not contest that that is the current law, but argued
2 that the law to be applied in this case was the law in effect on
3 the date of the bankruptcy filing. The bankruptcy court agreed and
4 so do we.

5 For purposes of § 544(a), the trustee acquires the rights and
6 powers of a hypothetical lien creditor who obtained a judicial lien
7 on all property of the estate as of the date the petition was
8 filed. 11 U.S.C. § 544(a); In re Commercial Western Finance Corp.,
9 761 F.2d 1329, 1331 n.2 (9th Cir. 1985). To the extent that the
10 security interest was unperfected on the date of filing, the
11 interest may be avoided. In re Berg, 45 B.R. 899, 902 (9th Cir.
12 BAP 1984).

13
14 II.

15 The Bullocks further assert that the trustee was on
16 constructive notice of the security interest in the land sale
17 contract due to the recording of the assignment in the Douglas
18 County real property records. The Bullocks used Chiapuzio to
19 support its argument.

20 In Chiapuzio, although the bank's interest was unperfected,
21 the court found that the bank's recording of the assignment in the
22 real property records was sufficient to give constructive notice to
23 Chiapuzio. Chiapuzio's claim, therefore, did not qualify for
24 priority over the bank's claim. Chiapuzio, 304 Or. at 454, 747
25 P.2d at 344. The Bullocks assert that the same should hold true in
26 this case because the assignment was recorded in the real property

1 records.

2 Although this argument may prevail in the context of the
3 trustee as a bona fide purchaser pursuant to § 544(a)(3), the
4 argument does not apply to the trustee as a hypothetical judicial
5 lien holder. "The trustee's actual or constructive knowledge has
6 no effect on his powers as a judicial lien creditor." In re Santa
7 Fe Adobe, Inc., 34 B.R. 774, 776 (9th Cir. BAP 1983), citing, In re
8 Minton Group, Inc., 27 B.R. 385, 391 (Bankr. S.D.N.Y. 1983),
9 aff'd., appeal dismissed, 46 B.R. 222 (S.D.N.Y. 1985)
10 ("Constructive notice does not preclude one from becoming a
11 judicial lien creditor or an unsatisfied execution creditor as it
12 does in the case of a bona fide purchaser, where such notice
13 affects the purchaser's bona fide status.").

14
15 III.

16 We now turn to the issue of what interest in the real
17 property, if any, the Bullocks hold. Although the Bullocks did not
18 properly perfect their interest in the land sale contract and the
19 proceeds therefrom, they did properly perfect their security
20 interest in the real property by recording the assignment in the
21 real property records.

22 The bankruptcy court found that under Oregon law "where a
23 party owns a security interest in collateral, but does not own the
24 underlying debt secured, the security interest is a nullity.
25 Futrell v. Wagner, 96 Or. App. 27, 771 P.2d 292 (1989), review
26 denied, 308 Or. 158, 776 P.2d 859 (1989); Schleef v. Purdy, 107 Or.

1 71, 214 P. 137 (1923)." Appellant's E.R. 334. The Bullocks
2 suggest that the bankruptcy court misapplied these cases to their
3 interest in the land sale contract.

4 In Futrell, Futrell Cereals, Inc. executed and delivered a
5 promissory note to Richard Busby in connection with a loan. The
6 Futrells guaranteed the note and assigned their vendor's interest
7 in a land sale contract to Busby as security for the note.
8 Thereafter, another party, Howard Houston Jr., made a loan to Busby
9 and Futrell Cereals and Busby assigned his interest in the land
10 sale contract to Houston as security. Busby and Futrell Cereals
11 defaulted on the loan from Houston. Houston subsequently assigned
12 his interest in the land sale contract to the defendants in the
13 case.

14 The Futrell court stated:

15 Plaintiffs contend that Houston obtained nothing by
16 Busby's assignment of his interest in the [land
17 sale] contract, because Busby had only a security
18 interest in it and did not assign to Houston the
19 underlying debt that it secured. Plaintiffs are
20 correct: The assignment of a security interest
21 without the assignment of the debt that it secures
yields the assignee nothing. Schleef v. Purdy et
al., 107 Or. 71, 78, 214 P. 137 (1923). The trial
court appears to have concluded that that assignment
was valid and could be assigned by Houston to
[defendant]. If so, it erred.

22 Futrell, 96 Or. App. at 31, 771 P.2d at 294 (1989) (emphasis
23 added).

24 The Bullocks assert that, with respect to the Futrell case,
25 their position is analogous to the original assignee of the note,
26 Busby, rather than Houston. We disagree. The trustee's avoidance

1 of the Bullocks' interest in the contract gives the Bullocks a
2 valid perfected security interest in the real property underlying
3 the contract, but nothing more. This is the same position held by
4 Houston in the Futrell case.

5 In Schleef v. Purdy, 107 Or. 71, 214 P. 137 (1923), the
6 Supreme Court of Oregon analyzed the interest in property created
7 when a mortgage is conveyed as security for payment of a debt. The
8 court stated that the mortgage as security for an underlying debt
9 vests no interest in the property but merely creates a lien
10 against the property. "The mortgagor has no interest in the
11 mortgaged premises which can be sold separately from the debt
12 itself, and the transfer of the mortgage, without a transfer of the
13 debt intended to be secured thereby, is a mere nullity." Schleef,
14 214 P. at 140.

15 Therefore, pursuant to Oregon law, the Bullocks' assignment of
16 the security interest in the property subject to the land sale
17 contract without the assignment of the underlying debt renders the
18 Bullocks' interest null. Accordingly, the bankruptcy court was
19 correct in holding that the Bullocks cannot compel the trustee to
20 abandon or foreclose upon the contract and in denying the Bullocks'
21 motion for relief from stay and motion for reconsideration of the
22 court's October 5, 1990 order.

23 24 CONCLUSION

25 For the foregoing reasons, the holding of the bankruptcy court
26 that the trustee may avoid the Bullocks' interest in the proceeds

1 of the land sale contract pursuant to 11 U.S.C. § 544(a), and that
2 any remaining interests of the Bullocks in the land which is the
3 subject of the contract are a nullity are affirmed. Additionally,
4 the court's denial of the Bullocks' motions for relief from the
5 automatic stay and to compel the trustee to abandon the interest in
6 the land sale contract are affirmed.

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United States Bankruptcy Appellate Panel
of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on 2/4/94.

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8½ by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

Bill of Costs

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules of Appellate Procedure 41.

Appeal to Court of Appeals

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.